

BEFORE THE
Federal Communications Commission
WASHINGTON, D. C.

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DEC - 1 1992

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Implementation of the
Cable Television Consumer
Protection and Competition
Act of 1992

Cable Home Wiring

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MM Docket No. 92-260

COMMENTS OF TELE-COMMUNICATIONS INC.

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APPENDIX A

SUMMARY

TCI fully supports Congress' efforts to facilitate subscriber ownership of home wiring. To accomplish Congress' goals, TCI believes the Commission should promulgate cable subscriber ownership rules which:

- define home wiring concisely to include wiring inside the private residence or individual residential dwelling unit of the cable subscriber and to exclude common wiring in multiple dwellings;
- for existing residential cable subscribers, vest ownership of home wiring in subscribers upon voluntary termination of cable service;
- for new residential cable installations, require subscriber ownership of home wiring upon installation of cable service, subject to cable operators' access rights to the home wiring to allow them to fulfill their signal leakage and other legal obligations;

The foregoing rules should apply equally to all video program distributors in order to facilitate competitive access and to afford consumers the freedom to select their video programmer on the basis of merit rather than incumbent advantage. Moreover, the rules should not apply where a multiple dwelling unit is wired for cable on a loop-through basis or where termination of cable service is involuntary due to non-payment or theft of service. TCI believes the principles set forth above fully comport with clear congressional policy and would best serve the public interest.

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COMMENTS OF TELE-COMMUNICATIONS INC.

Tele-Communications Inc. ("TCI"), hereby files its comments in the above-captioned proceeding.¹ TCI is a multiple systems operator providing cable service in 48 different states to more than nine million subscribers. TCI is thus an interested party to this proceeding.

The instant proceeding, the first commenced by the Commission to implement the Cable Television Consumer Protection and Competition Act of 1992,² will promulgate rules to govern the disposition of home wiring after a cable subscriber voluntarily terminates service. The promulgation of

¹ Notice of Proposed Rulemaking in MM Docket No. 92-260, FCC 92-500 (rel. Nov. 6, 1992) ("Notice").

² Pub. L. No. 102-385, 102 Stat. ____ (1992) ("1992 Cable Act").

such rules is required by Section 16(d) of the 1992 Cable Act.³ TCI fully supports the legislative policy embodied in Section 16(d) and endorses the adoption of rules that would vest residential cable subscribers, upon voluntarily terminating service, with the ownership of the wiring inside their homes -- either single family or individual units within a multi-unit building. TCI further proposes an additional rule to vest home wiring ownership in new subscribers upon installation. Because such rules implicate issues of legal, competitive, and technical significance, certain conditions should also be included.

A. Section 16(d), As Clarified by Its Legislative History, Favors A Subscriber Right to Ownership Upon Voluntary Termination of Cable Service.

Section 16(d) requires simply that the Commission "prescribe rules concerning the disposition, after a subscriber to a cable system terminates service, of any cable installed by the cable operator within the premises of such subscriber." The statute itself does not require the prescription of any particular "disposition" of such wiring. As the Notice correctly observes, however, the legislative history makes plain Congress' expectation that the FCC provide for a subscriber right to acquire control over the inside wiring

³ Id. at § 16(d) (1992), to be codified at 47 U.S.C. § 544(i) ("Section 16(d)").

after a voluntary cessation of service.⁴ As described in detail below, TCI supports the adoption of a rule that would give residential subscribers clear ownership (and all other attendant rights and liabilities) of the wiring located internally within their premises upon voluntary termination of cable service.

In enacting Section 16(d), Congress' objectives were fairly unambiguous: Congress sought to enjoin the practice, however uncommon, by some cable operators of removing inside wiring when a subscriber chose to discontinue cable service and replace that service with a competing distributor. Both the competitive implications and the consumer inconvenience resulting from this practice concerned Congress:

The Committee believes that subscribers who terminate cable service should have the right to acquire wiring that has been installed by the cable operator in their dwelling unit. This right would enable consumers to utilize the wiring with an alternative multichannel video delivery system and avoid any disruption the removal of such wiring may cause.⁵

As the Notice correctly reflects, the Commission must address the issue of home wiring disposition in a manner consistent with the legislative concerns for competitive access, consumer inconvenience and, equally importantly, the provision of

⁴ Notice at ¶ 2.

⁵ H.R. Rep. No. 628, 102d Cong., 2d Sess. (1992) ("House Report") at 118.

efficient incentives to cable operators to continue to wire the country. Congress' apparent solution to balancing these objectives is to require that terminating subscribers have the right to the wiring.⁶

As briefly noted in the Notice, there is another significant federal policy which is recognized in the legislative history and which, as a matter of public safety, must also be accommodated. Congress was expressly concerned that: "improper installation or maintenance could threaten safety services that operate on critical frequencies."⁷ Thus, signal leakage is another significant factor for the FCC to consider in promulgating the instant rules.

Consistent with this legislative policy, TCI supports a rule that would vest cable subscribers with all rights to the home wiring upon voluntarily terminating cable service. The Commission should adopt a rule which automatically designates the cable subscriber, upon voluntarily terminating service, as the owner of the home wiring. Further, to minimize disputes regarding operation of such a rule for new wiring, the Commission should additionally require that all new installations provide for subscriber ownership of inside wiring

⁶ See Senate S. Rep. No. 92, 102d Cong., 1st Sess. (1992) ("Senate Report") ("For cable, however, the FCC should . . . permit ownership of the cable wiring by the homeowner.") Id. at 23.

⁷ House Report at 119.

upon installation. Subscriber ownership must in these cases be subject to a cable operator's right of access to ensure signal integrity. The rules, to be legally valid and otherwise within the reasoned decisionmaking requirements of the Administrative Procedure Act, must be accompanied by several additional safeguards and conditions.

B. Numerous Implementation Issues Must Be Addressed in Promulgating the General Policy Favoring Subscriber Ownership of Home Wiring.

1. Definition of Home Wiring.

The initial task for the Commission is to define what home wiring means. The Notice correctly begins by excluding any "active elements" such as "amplifiers, decoder boxes or similar apparatuses."⁸ Thus, "only the cable itself" is covered by the term.⁹ Similarly, the statute itself describes home wiring as "cable . . . within the premises of [the] subscriber."¹⁰ The Commission should make clear that the rules here address only that wiring inside the home and not the drop to the home from the street. An analogous rule holds for

8 Notice at note 4.

9 Id.

10 See also House Report at 118 ("This provision applies only to internal wiring contained within the home and does not apply to any of the cable operator's other property located inside the home (e.g., converter boxes, remote control units, etc.) or any wiring, equipment or property located outside of the home or dwelling unit."); Senate Report at 23 ("This provision shall not apply to any wiring outside the home.").

multiple dwelling units, where the term excludes "common wiring within the building . . . but [includes] the wiring within the dwelling unit of individual subscribers."¹¹

2. Embedded Wiring/New Installations.

As the Notice discusses, the Commission's task here is complicated by the fact that there has been considerable controversy regarding the current ownership of cable home wiring.¹² Much of this litigation has occurred at the state level, most especially in the assessment of state realty and personalty taxes. At the time of installation and throughout the duration of the operator-subscriber relationship, state property laws may deem the wiring to be the property of either the cable operator or the subscriber. In these patently distinguishable contexts, the state courts have arrived at diverse conclusions on whether cable wiring (typically addressing the outside drop as well as the internal wiring) is the taxable property of either the cable company or the subscriber. But the Commission has not been given the task of setting tax policy, neither federal nor state. Rather, the Commission has been assigned the narrower question of who should own the wiring after the service relationship is over. As discussed supra, TCI believes that Congress has expressed

¹¹ House Report at 119. The special problem created by "loop-through" wiring is addressed at p. 13 infra.

¹² Notice at ¶ 5.

its strong preference to provide for subscriber ownership of embedded wiring upon voluntary termination of cable service. As discussed, TCI further submits that this policy can be fostered by an additional rule, applicable to new installations, that would establish ownership in the subscriber upon installation.

In promulgating subscriber ownership rules, the FCC must ensure that the operation of any such rules does not frustrate the stated policy goal of providing efficient investment incentives to cable operators.¹³ In this regard, it is important to note that in many cases, the cable operator may not yet have fully recovered the costs of embedded inside wiring and the associated labor costs. At present, the cost of the wiring and its installation as a general matter are not fully recovered by the charges assessed for installation. The costs are generally treated as capital expenditures and are amortized over the life of the wiring. Where a subscriber chooses to terminate sufficiently early in the service relationship, that is prior to the full amortization period, the cable operator may have failed to recover those remaining costs. In the case of embedded wiring, TCI is prepared to accept these costs. On a going-forward basis, however, cable

¹³ See Notice at ¶ 2. Because TCI is amenable to vesting ownership in the hands of voluntarily terminating subscribers, it does not address the Fifth Amendment issues which might otherwise be raised here.

operators will need to respond to the new rules by fully expensing the installation costs in the year of installation. The start-up charges to the subscriber will need to increase correspondingly. The Commission should be prepared, then, to address this issue of installation charges in the upcoming Rate Regulation proceeding.

3. Multiple Dwelling Units.

In the case of MDUs, the inside wiring, that is the wire "within the dwelling unit of individual subscribers," should be governed by the same subscriber ownership rules that will control single family units. The Commission must make clear, however, that neither the subscriber nor the premises owner has any rights with respect to the common wiring. Any common wiring must remain outside the subscriber ownership rules in order to balance equitably all of the policy considerations. First, the language of the statute and its legislative history make clear this distinction.¹⁴ Second, the common wiring is the ongoing responsibility of the cable operator. Third, there is no ready mechanism for requiring the transfer of the common cabling even if that were deemed desirable; simply because one apartment tenant has chosen to

¹⁴ Both the statute itself and the Senate Report (at 23) focus on the disposition of the internal wiring of "a subscriber." The House Report (at 119) is even more explicit in making this distinction: "In the case of multiple dwelling units, this section is not intended to cover common wiring within the building, but only wiring within the dwelling unit of individual subscribers."

discontinue service does not mean that all remaining tenant/subscribers wish to do so, much less desire to assume ownership of and maintenance responsibilities for the wiring. There can be little doubt that alternative video distributors would have cheaper and thus more ready access to MDUs were all wiring to be declared public property. But that sort of extreme market handicapping is plainly not what Congress had in mind in Section 16(d). See generally Section 2(b)(2) ("It is the policy of the Congress in this Act to . . . rely on the marketplace, to the maximum extent feasible . . ."). It would also be wholly at odds with the recognized federal policy to avoid "discourag[ing] cable investment in continuing to extend service to unwired homes by failing to account adequately for the property, contractual, and access rights of cable operators."¹⁵ Further, the legality of such a result would be in serious doubt. Finally, as the Commission notes (Notice at ¶ 5) there are numerous state statutes which provide for access to MDUs, consistent with the Supreme Court's decision in Loretto v. TelePrompster¹⁶ and its progeny. Again, there is no indication of any legislative intent to undo these statutes by somehow affecting the common wiring.

In a related issue, the Notice asks whether these state access statutes are consistent with a federal rule

¹⁵ Notice at ¶ 2.

¹⁶ 458 U.S. 419 (1982).

transferring individual unit inside wiring post-termination.¹⁷ TCI believes that the two regimes are consistent, provided the federal rule applies to wiring inside the individual units. The state access statutes do not guarantee a cable operator (or any program distributor) customers, but merely the right to offer individual units programming service. If a cable subscriber chooses to terminate service, the service provider has by definition had access to the unit. Indeed, in some cases, the state statute may grant operators access only to the common areas of a multiple dwelling. While of course there may be particulars in certain state statutes which may need to be reconciled with the new regulatory policy,¹⁸ TCI believes that the two approaches are logically consistent with one another.

Any rule governing subscriber ownership of home wiring should apply equally to all video program distributors, so that the competitive access concerns are met with respect to all competitors. There is no reason why federal law should determine that subscribers be given dominion over some types of video distribution inside wiring (i.e., that installed by a cable operator) but not others (e.g., SMATV-installed wiring). Applying such a rule across-the-board gives consumers the

¹⁷ Notice at ¶ 5.

¹⁸ For example, the owner of an apartment building could not foreclose the future use of the inside wiring, once acquired from the initial operator, for cable service if the next tenant desired to subscribe.

intended freedom to select their video programmer on the basis of merit rather than incumbent advantage, and is thus in the public interest. Although the literal terms of the statute apply only to cable operators, there can be little doubt that the FCC has ample jurisdiction to apply the rules to all video distributors. See generally United States v. Southwestern Cable, 392 U.S. 157 (1968).

4. Home Wiring Obligations Attendant to Ownership.

Once the home wiring ownership rests clearly with the subscriber, it should be equally unambiguous that the cable operator has no continuing or surviving obligations with respect to such wiring. This is a matter of fundamental fairness; the rights and obligations should move in tandem.¹⁹ To the extent the Notice suggests otherwise, TCI respectfully submits it is incorrect.

The Commission's rules on signal leakage impose obligations upon cable operators as service providers; once service is terminated, it is no longer the transmissions of the cable operator which could "leak." If, for example, the inside wiring, now the property of the residence owner, is being used unlawfully to transmit a stolen cable signal, then any signal

¹⁹ Moreover, it is wholly consistent with basic tenets of commercial law which dictate that such a transfer of cable ownership triggers a concomitant shift in the risk of loss from the cable operator to the subscriber. See Uniform Commercial Code § 2-509.

leakage should be the exclusive responsibility of the owner. And if a second video distributor is transmitting over that wiring in the home and there is leakage, it is the responsibility of that second operator. Further, for new installations, subscriber ownership must be conditioned upon rights of access in the cable operator (or other distributor providing service) to such wiring in order to fulfill its signal leakage and other legal obligations.

This construction is also required by the legislative history. The House Report contemplates that cable operators' signal leakage obligations occur "during the period the cable operator is providing service to [the] subscriber" and expressly disavows any construction that would permit an active subscriber to interfere with those obligations.²⁰ But there is nothing in the Report that could be construed as imposing any obligation once service is no longer being provided by the cable operator. To hold otherwise would be to require the cable industry to act as guarantor and insurer, a role plainly at odds with industry custom and with the statutory scheme.

²⁰ The House Report explicitly states: "Nothing in this section should be construed to create any right of a subscriber to inside wiring that would frustrate the cable operator's ability to prevent or protect against signal leakage during the period the cable operator is providing service to such subscriber." Id. at 119.

5. Exceptions to the Subscriber Ownership Rules.

There are two readily identifiable situations which warrant exceptions to the general residential subscriber ownership rules. First, in the case of certain building wiring configurations, a rule applying to individual units will have potentially adverse effects for the entire building. Although it is not typical, some buildings may be wired for cable on a "loop-through" basis.²¹ In such cases, allowing a terminated subscriber unfettered control over the wiring even internal to the apartment could result in cable service to the entire building being disturbed. Therefore, an explicit exception to the subscriber ownership rules should be carved out for "loop-through" buildings.

Second, the post-termination subscriber ownership rule should not apply at all to cases of involuntary termination. As the Notice correctly points out, the legislative history makes clear that subscribers whose service is terminated due to theft or nonpayment should not have the benefits otherwise available to terminating subscribers.²² This is presumably based upon the concern that these persons, if given control and

²¹ Buildings wired on a "loop-through" basis deliver signals to the individual units in a chain -- the cable runs in a continuous loop from one unit to the next such that a break or interference in one link of the chain will have deleterious effects on multiple units in the chain.

²² Notice at ¶ 4.

access to such wiring, might continue in their unlawful conduct. Thus, it should be made plain that as a matter of federal policy, cable operators are free to remove inside wiring in such cases and, in any event, to act to stop signal piracy in such termination cases.

C. Conclusion.

TCI supports the adoption of subscriber ownership rules to give ownership of home wiring to subscribers under certain express conditions. TCI has appended recommended rules to implement Section 16(d), as attached, and respectfully submits them for FCC adoption.

Respectfully submitted,
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APPENDIX A

PROPOSED RULES FOR CABLE HOME WIRING

PROPOSED RULES FOR CABLE HOME WIRING

Amend section 76.5 to add the following definitions:

1) Home Wiring. That part of a cable wiring system which is entirely contained within single family homes or individual units within a multiple dwelling. Home wiring does not include other cable operator property located inside the home or individual units (such as amplifiers, converter boxes, remote control units, or similar apparatuses) nor any wiring, equipment, or property located outside of the home or individual dwelling units. In the case of a multiple dwelling unit, home wiring does not include common wiring within the building.

2) Loop-Through Wiring. A method of wiring multiple dwelling units for cable service whereby the physical cable runs throughout the building in a continuous loop from one individual dwelling unit to the next. This method of wiring is to be contrasted with a "tree-and-branch" type wiring scheme whereby central cables run throughout the common areas of the building and dedicated sections of cable "branch" off of these central cables and run into the individual dwelling units.

Insert a new Subpart L at the end of section 76.

Subpart L -- Home Wiring

§ 76.701 Scope

(a) The provisions of this subpart set forth rules and regulations for: (1) the disposition, after a residential subscriber to a cable system voluntarily terminates cable service, of home wiring installed by the cable operator within the premises of the subscriber where such wiring has been installed prior to the expiration of 60 days following the effective date of these rules, and (2) the ownership of residential home wiring where such wiring is installed after the expiration of 60 days following the effective date of these rules.

§ 76.703 Home Wiring Subscriber Ownership Rules

(a) Upon voluntary termination of cable service, a residential cable subscriber will be deemed to be the owner of the home wiring installed by the cable operator.

(b) For any home wiring installed after the expiration of 60 days from the effective date of these rules, such home wiring shall be deemed to be the property of the subscriber.

(c) In the case of a multiple dwelling unit, the home wiring within each individual dwelling unit will be subject to the ownership rules set forth in (a) and (b) above, unless the building has loop-through wiring. Any common wiring shall remain the property of the cable operator and neither the subscriber nor the building owner will have any rights to such wiring.

(d) In any instance where the subscriber is deemed to have ownership of the home wiring, all attendant rights to and obligations and liabilities for the home wiring shall similarly vest in the subscriber. The cable operator will have no further ownership interest in or surviving liabilities for the home wiring, except to the extent it continues to provide (or recommences) service over such wiring. Any service provider willfully providing service over home wiring owned by its subscriber shall be entitled to all rights of access necessary or appropriate to fulfill its legal obligations relating to the provision of service.

(e) The subscriber ownership rules herein shall apply equally to all video program distributors.